SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cuskelly* [2009] QCA 375
PARTIES:	**R** **v** **CUSKELLY, Michael John** (appellant)
FILE NO/S:	CA No 39 of 2009 SC No 936 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2009
JUDGES:	Keane and Muir JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Conviction set aside** **3. New trial of the charge of murder**
CATCHWORDS:	CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – DEFENCE OF PERSONS OR PROPERTY – DEFENCE OF PROPERTY – where the appellant was convicted by jury of one count of murder – where the appellant stabbed the deceased in the chest and penetrated his heart – where the appellant and the deceased engaged in altercation at the appellant's residence – where appellant claimed that he feared that the deceased would attack himself and his wife – where the learned trial judge did not direct the jury in relation to s 267 of the *Criminal Code* 1899 (Qld) ("the Code") – where learned trial judge did not direct the jury in relation to s 23(1)(a) of the Code – whether miscarriage of justice occurred by virtue of the learned trial judge's failure to so direct the jury *Criminal Code* 1899 (Qld), s 23, s 267, s 271, s 272, s 668E *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, cited *R v Hussey* (1924) 18 Cr App Rep 160, cited

Stevens v The Queen (2005) 227 CLR 319; [2005] HCA 65, cited
The Queen v Soma (2003) 212 CLR 299; [2003] HCA 13, cited
Van Den Hoek v The Queen (1986) 161 CLR 158; [1986] HCA 76, cited

COUNSEL: P J Callaghan SC, with E Gass, for the appellant
M J Copley SC for the respondent

SOLICITORS: Walker Pender for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** The appellant was convicted upon the verdict of a jury of one count of murder. Mr Carr ("the deceased") died of a stab wound to the chest on 17 September 2007. The stab wound was inflicted by the appellant. The appellant and the deceased were engaged in an altercation when a knife held by the appellant entered the chest of the deceased and penetrated his heart.

[2] The appellant seeks orders that the conviction of murder be set aside and a new trial ordered on a charge of manslaughter only.

[3] The grounds of appeal on which the appellant relies assert error of law on the part of the learned trial judge in his directions to the jury. The appellant also asserts that there was not a sufficient basis in the evidence for the jury to be satisfied beyond reasonable doubt that the appellant intended to kill the deceased or to cause him grievous bodily harm. I will discuss these grounds of appeal after summarising the case against the appellant at trial.

The case against the appellant

[4] On the evening of 17 September 2007 the appellant was at home in his unit at North Ipswich drinking wine with his wife. The deceased had been drinking for some time in a park across the road from the appellant's unit. An autopsy report showed that the deceased had a blood alcohol concentration of .249. The deceased began calling out to the appellant saying that he wanted to come up to the appellant's unit to speak to his "Aunty Ruby", who is the appellant's wife.

[5] An exchange of insulting and threatening language ensued. Mr Millwood, an ambulance officer who was working at the ambulance station beside the appellant's unit block, heard the deceased call out words to the effect of: "I'll get you, you bastard." And in response: "Fuck off. I'll cut your throat, you dog." Other witnesses gave evidence to similar effect.

[6] Ms Phyllis Thompson, who lived downstairs from the appellant, heard the deceased going up the stairs yelling: "… come out here and fight like a man instead of hitting Aunty Ruby." The appellant was heard to say: "You come here you black dog, I'll put this knife through you."

[7] The appellant gave a record of interview to the police. He said that he did not believe that the lock on the front door of his unit would withstand a determined attack by the deceased. He said that he did not want the deceased in his house "[a]ttacking my fucking wife and me". He said he was "physically in fear of my life

and my Mrs life." The appellant said that he unlocked the security door of his unit and stepped outside. He said that he saw the deceased coming up the stairs, and then went back inside and obtained two knives. He said that he went back out the door and walked down about two steps and kicked the deceased in the chest. The appellant said:

> "He's come at me first. I've tried to kick at his chest. Trying to punch at me I've kicked him. Didn't faze him. And I've the knives gone into his chest. I didn't realise that the damage that had been done to him. He's fallen down the steps …"

[8] At another point in the record of interview, the appellant said:

> "He kept coming at me at a threatening manner. And then, the knife went into his chest … I don't know that's a real fuzzy and unclear and un-ah, thing for me because it was sort of like bing bang boom it was done. That was it. I gone and grabbed the knives, chucked them inside."

[9] In the record of interview, the appellant said that he had no intention of using the knives and that he had hoped that the sight of a knife would deter the deceased. He said that the deceased wanted to "attack me … [s]o I retaliated by defending myself … what would you do if someone comes at you and threatens you?" When it was suggested to the appellant in the course of the interview that he would have avoided the threat by closing the door, the appellant said that the deceased "probably would have kicked the door". He said that he opened the door "to try and fend him off, to get him away from my premises to protect my property and my wife".

[10] After the stabbing, the appellant tried to help the deceased and was still rendering assistance when an ambulance officer arrived.

[11] The stab wound to the chest of the deceased extended 25 centimetres into his body. The knife entered through the fourth and fifth intercostal spaces and penetrated the heart of the deceased. A pathologist who gave evidence at trial was of the opinion that a moderate amount of force would be required to cause this injury, but the possibility that the deceased fell onto the knife could not be excluded.

The directions to the jury by the learned trial judge

[12] The learned trial judge directed the jury in relation to self-defence, by reference to s 271 and s 272 of the *Criminal Code* 1899 (Qld). His Honour said:

> "The defence case is that [the appellant] was a man defending his own home. He had been abused in his home over an extended period by a man he knew was drunk and a user of methylated spirits. It was a dangerous area frequented by drunks, drug users and often violent. [The appellant] had himself lived on the streets and knew the risk such people posed. He had tried calling the police, but without success. No-one had come. There was no doubt [the deceased] intended to assault him. While a beating might not kill him, it might result in serious injury; grievous bodily harm, using a neutral expression. He told the police in his interview that he had no confidence in the lock on the front door if [the deceased] was determined to get in.
>
> Mr Byrne submitted that you would reject [the appellant's] assertion that the door lock was 'fucked' as an invention, but despite having said that to the police on the night of the stabbing nobody on behalf

> of the prosecution bothered to check whether or not the lock was working properly. Remember, the prosecution must prove [the appellant's] conduct was unreasonable. [The appellant] chose to confront [the deceased] at the entrance to his home and ward him off with a knife. He tried to push [the deceased] away with his foot, but it was no deterrence. Eventually he used the knife to stop [the deceased].
>
> The defence says that he was acting in defence of his home, his partner and himself and at law he is not guilty of any offence in doing so. He was acting in self-defence."

[13] No complaint is made on appeal in respect of his Honour's direction in relation to self-defence.

[14] Notwithstanding his Honour's reference to the appellant's case that "he was acting in defence of his home", there was no specific direction sought by the defence, or given by the learned trial judge, in relation to s 267 of the *Criminal Code*.

[15] A direction was sought by the appellant's Counsel in relation to s 23 of the *Criminal Code*. The learned trial judge declined to give that direction.

The grounds of appeal

[16] The grounds of appeal are:

> Ground 1: A miscarriage of justice occurred in that the learned trial judge failed to address the jury in terms of s 267 of the *Criminal Code*.
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> Ground 2: The learned trial judge erred when he failed to explain to the jury the operation of s 23 of the *Criminal Code*.
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> Ground 3: The verdict of the jury was unreasonable, in that it could not be established beyond a reasonable doubt that the appellant intended to kill or do grievous bodily harm.

[17] I will address the arguments relating to each ground of appeal in turn.

Ground 1

[18] It is argued on behalf of the appellant that the excerpt from the learned trial judge's directions set out above itself provides some indication that there should have been a direction as to the possibility of a defence under s 267 of the *Criminal Code*. It is said that the availability of the defence afforded by s 267 of the *Criminal Code* is not limited by a requirement of an unlawful assault on the accused before the use of force by the accused. More importantly, the availability of the defence under s 267 is not limited by the requirement in s 271 and s 272 that the force used be no more than is reasonably necessary to make an effectual defence against the assault.

[19] It is convenient to note here the textual differences between s 267 and s 271 and s 272 of the *Criminal Code*. Section 267 provides:

> "**Defence of dwelling**
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> It is lawful for a person who is in peaceable possession of a dwelling, and any person lawfully assisting him or her or acting by his or her

authority, to use force to prevent or repel another person from unlawfully entering or remaining in the dwelling, if the person using the force believes on reasonable grounds—

(a) the other person is attempting to enter or to remain in the dwelling with intent to commit an indictable offence in the dwelling; and

(b) it is necessary to use that force."

[20] Section 271 of the *Criminal Code* provides:

"**Self-defence against unprovoked assault**

(1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

(2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm."

[21] Section 272 of the *Criminal Code* provides:

"**Self-defence against provoked assault**

(1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.

(2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable."

[22] The respondent argues that because no direction in respect of s 267 of the *Criminal Code* was sought by the defence at trial, the learned trial judge cannot be said to have made a "wrong decision on any question of law" so as to enliven the right of appeal to correct a "wrong decision [on a] question of law" conferred by s 668E(1) of the *Criminal Code*.[1] The respondent argues that the appellant has an appeal by reason of the absence of a direction to the jury to consider s 267 of the *Criminal Code* only if the absence of such a direction occasioned a "miscarriage of justice" within the meaning of that phrase in s 668E(1) of the *Criminal Code*. The respondent makes two submissions as to why this Court should conclude that no miscarriage of justice occurred.

[23] The respondent's first submission is that an arguable defence under s 267 was not raised on the evidence. In particular, it is said that an arguable case of a defence under s 267 of the *Criminal Code* is not raised merely because the accused is in or about his dwelling when he is attacked. It is said that there was not any evidence from which it might be inferred that the appellant stabbed the deceased in order to prevent him from entering the appellant's unit. The argument is that the appellant's statements to police raised only a case of defence of the appellant's person.

[24] This submission cannot be accepted. The appellant's statement to police included statements that he did not want the deceased in his house "attacking my fucking wife and me". He spoke of being "physically in fear of my life and my Mrs life". It is apparent that the deceased was approaching the unit and was threatening violence to the appellant. The appellant said that he opened the door of the unit to confront the deceased "to try and fend him off, to get him away from my premises to protect my property and my wife".

[25] At the very least the evidence gave rise to an arguable case that the appellant believed on reasonable grounds that the deceased was determined to enter the unit with intent to assault the appellant, and that lethal force was necessary to repel the assailant. There was "some evidence fit for [the jury's] consideration"[2] that, in using lethal force against the deceased, the appellant was acting to "prevent or repel" the deceased from entering his unit. As has been noted, the directions which the learned trial judge gave the jury reflected the notion that the appellant was engaged in the defence of his home without adverting to the more liberal defence available in consequence.

[26] The respondent's second submission under this rubric is that the verdict of the jury shows that they rejected self-defence under s 271 and s 272 as a defence, and would have inevitably rejected a defence under s 267. The basis for this submission is that s 267 requires that the force used by the accused must be limited to that which the accused believes on reasonable grounds is necessary to prevent or repel the incursion. It is said that the verdict rejecting self-defence shows that the jury were satisfied beyond reasonable doubt that the appellant did not believe on reasonable grounds that resort to lethal force was necessary.

[27] The respondent's submission fails to recognise that s 267 does not require that the force used by an accused be no more than is reasonably necessary to make an effectual defence of his or her person against a would-be intruder.[3] Further, if lethal

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1 *The Queen v Soma* (2003) 212 CLR 299 at 303 – 304 [11], 305 [15] and 312 [42].

2 *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 161.

3 Cf *Criminal Code* 1899 (Qld), s 271(1).

force is used, the accused need not reasonably apprehend death or grievous bodily harm from the accused's assault in order to raise a defence under s 267.[4]

[28] It was argued on behalf of the respondent that the learned trial judge had, in truth, directed the jury upon the crucial issue arising under either s 267 on the one hand, or s 271 or s 272 on the other, in that his Honour instructed the jury: "The critical question is whether the defendant believed on reasonable grounds that the force used was necessarily [sic] for defence. The important issue is the state of mind or belief of the defendant." The learned trial judge went on, however, in the next sentence to make it clear to the jury that the relevant question, so far as "the state of mind of the defendant" was concerned, was whether the defendant actually believed on reasonable grounds "that it was necessary to do what he did to save himself from death or very serious injury."

[29] In the circumstances of the present case the question which arose under s 267 was whether the appellant believed on reasonable grounds that it was necessary to use the force he did use to "prevent or repel [the deceased]" from entering his unit with intent to assault the appellant. An accused person who is defending his or her home need not retreat from a threat even if retreat is a reasonably available way to make effectual defence against a threatened assault.[5]

[30] During the course of oral argument on the hearing of the appeal Mr Copley of Senior Counsel who appeared for the respondent argued that where a defence of self-defence is raised by the accused, s 271 and 272 of the *Criminal Code* operate to the exclusion of s 267. I am unable to accept that submission. Where it arises on the evidence, s 267 affords a separate, and more extensive, ground of defence to an accused. It is apparent that s 267 is informed by policy considerations different from the affirmation of the legitimacy of proportionate force in self-protection embodied in s 271 and s 272. Section 267 gives effect to a policy of the law which recognises the legitimate use of force to defend hearth and home and to prevent the commission of offences by others in one's home. This policy would not be well-served if the defence afforded by s 267 were to be subsumed in practice by s 271 or s 272.

[31] In my respectful opinion, the appellant was denied a fair chance of acquittal under s 267. There was a miscarriage of justice in this case because the jury were not instructed to consider whether the appellant should be acquitted under s 267 of the *Criminal Code*.

[32] That conclusion is sufficient to warrant setting aside the conviction and ordering a new trial.

Ground 2

[33] Under this heading, it is said on the appellant's behalf that the learned trial judge ought to have directed the jury that it was for the Crown to satisfy them beyond reasonable doubt that the stabbing occurred independently of the appellant's will and that the punctuation of the heart of the deceased was not accidental.[6]

[34] Section 23 of the *Criminal Code* provides:

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4 *Criminal Code* 1899 (Qld), ss 271(2), 272(1).

5 *R v Hussey* (1924) 18 Cr App Rep 160 at 161.

6 *Stevens v The Queen* (2005) 227 CLR 319 at 345 [78], 369 [158].

"**Intention–motive**

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for–
  (a) an act or omission that occurs independently of the exercise of the person's will; or
  (b) an event that occurs by accident.

(1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality even though the offender does not intend or foresee or can not reasonably foresee the death or grievous bodily harm.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."

[35] At trial the appellant's Counsel sought a direction to the jury that they should consider whether the appellant was excused from criminal responsibility for the death of the deceased by s 23(1)(a) of the *Criminal Code*. In this Court it is submitted that both s 23(a) and (b) should have been put to the jury by the learned trial judge.

[36] The respondent submits that there was no suggestion in the evidence, and in particular the appellant's statement to police, that the stabbing of the deceased occurred independently of the appellant's will or that his death occurred by accident.

[37] The evidentiary basis on which a defence under s 23 is said to be raised is, it must be said, quite slim. There is also other evidence negativing this defence. Nevertheless, the pathologist who gave evidence for the Crown could not exclude the possibility that the deceased fell onto the knife held by the appellant. It is also the fact that both the appellant and the deceased had been drinking, and there was a scuffle on the stairway in which the entry of the knife into the body of the deceased might possibly have occurred without a voluntary act on the appellant's part. On the respondent's behalf it is argued that the appellant's statement to police that "bing bang boom it was done" is meaningless, but in the context in which that statement was made the appellant might have been seeking to convey that the stabbing occurred of a sudden without a deliberate stabbing on his part.

[38] In the circumstances I consider that the learned trial judge should have instructed the jury to consider the possibility that the appellant was excused of criminal responsibility by s 23(1) of the *Criminal Code* and that his Honour erred in failing to do so. Having regard to the conclusion which I have reached in relation to the first ground of the appeal, it is not necessary to consider whether this error, considered on its own, was such as to warrant setting aside the conviction.

Ground 3

[39] On the appellant's behalf it is submitted that the new trial necessitated by the errors of law involved in the misdirection of the jury should be limited to a charge of manslaughter. That is said to be because this Court should hold that on the totality of the evidence, one cannot exclude beyond reasonable doubt the possibility that the fatal wound was inflicted with intent to kill or cause grievous bodily harm to the deceased.[7] I am unable to accept that submission.

[40] In my respectful opinion, on the totality of the evidence one could reasonably conclude that the appellant stabbed the deceased without lawful excuse and intending to cause death or grievous bodily harm. The appellant had, after all, armed himself with a knife. Its potential to cause death or grievous bodily harm was obvious. On the evidence of one bystander, he had threatened to "put this knife through you". The deceased was killed by the insertion of the knife blade between the fourth and fifth intercostal spaces and thence into the heart. The appellant's explanation of how that occurred was vague and less than compelling. On this view of the evidence any doubt as to whether the appellant intended to achieve the obvious purpose for which knives are usually used in brawls can readily be regarded as unreasonable.

[41] The third ground of appeal should be rejected.

Conclusion and orders

[42] The appellant is entitled to succeed on the first and second grounds of appeal.

[43] The appeal should be allowed, the conviction should be set aside and there should be a new trial of the charge of murder.

[44] **MUIR JA:** I agree with the reasons of Keane JA and with his proposed orders.

[45] **DAUBNEY J:** I respectfully concur with the reasons for judgment of Keane JA, and the orders he proposes.

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7 *MFA v The Queen* (2002) 213 CLR 606 at 614 – 615 [25] and 624 [59].